No. 80-757

Supreme Court, U. S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,

Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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RESPONDENTS' OPPOSITION TO MOTION
FOR LEAVE TO FILE BRIEF AMICI CURIAE

The respondents oppose the motion of nine United States Commodity Exchanges ("EXCHANGES") for leave to file a brief amici curiae before the granting of a writ of certiorari to the United States Court of Appeals for the Second Circuit in support of the instant petition of the New York Mercantile Exchange. Petitioners consented to the EXCHANGES' request for appearance as amici curiae.

These EXCHANGES lobbied intensively before Congress in 1974 for language specifically repealing an already implied cause of action under the Commodity Exchange Act. That position was specifically rejected by the Congress. See, Hearings on S.2485, S.2578, S.2837 and H.R. 13113 before the United States Senate Committee on Agriculture and Forestry, 93rd Cong., 2nd Session, at page 259.

The EXCHANGES should not now be permitted before this Court to dress that once rejected lobbying in legal clothes. As the proposed amici's motion candidly admits ". . . the instant case involves significant issues of public policy, central to the nature and ~~pro~~ proper functioning of . . . self regulation by the EXCHANGES . . . ." This was the thrust of the EXCHANGES' 1974 presentation to Congress. Congress rejected it then; this Court should not legislate it

now. See, Powell, J., dissenting in Cannon v. University of Chicago, 441 U.S. 667 (1979).

Moreover, the motion should be denied because counsel for petitioner, New York Mercantile Exchange, Maurice Mound, Esq., who signed its petition for certiorari as "of counsel", also signed the motion and proposed brief amici, as "of counsel" apparently on behalf of petitioner. We note that the last paragraph of the amici curiae motion for leave to file a brief amici curiae criticizes the petition for certiorari of the New York Mercantile Exchange in the last paragraph for failing to make certain arguments.

Apart from providing the Court with the rare spectacle of a petitioner seeking amicus status for itself, the motion affords petitioner an opportunity to present conflicting arguments. The Court should not permit the use of the disfavored brief amicus before the grant of certiorari in this improper way.

The motion should be denied, and respondents awarded their costs in opposing this motion.

Respectfully submitted,

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